IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 10-0092

IN THE MATTER OF:

T.H.,

A Youth in Need of Care.

BRIEF OF APPELLEE

On Appeal from the Montana Sixth Judicial District Court,
Park County, The Honorable Laurie McKinnon, Presiding

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STATEMENT OF THE ISSUES[1]

1. Did the district court's failure to issue a written order adjudicating T.H. a youth in need of care violate R.H.'s right to due process where R.H. stipulated that T.H. was a youth in need of care and the district court orally ruled that T.H. was a youth in need of care?

2. Did the district court violate R.H.'s right to due process by vacating the dispositional hearing and scheduling a termination hearing when the Department filed a petition for termination before the dispositional hearing had been held?

3. Did the district court violate R.H.'s right to due process when it determined that reunification efforts were not necessary before it held a hearing on that issue?

4. Did the district court abuse its discretion when it terminated R.H.'s parental rights to T.H. after the district court found that, at the age of four and a half months, T.H. had four broken bones that were the result of physical abuse and R.H. neglected T.H. by failing to seek timely medical treatment for those injuries?

[1] In this brief, the Department addresses the issues raised in R.H.'s brief. The Department filed a brief responding to A.G. on May 13, 2010.

STATEMENT OF THE CASE AND FACTS

Appellant, R.H., and his live-in girlfriend, A.G., are the parents of T.H. On Monday, December 1, 2008, A.G., brought their four and a half month old daughter, T.H., into the emergency room in Livingston claiming that T.H. had not been moving her right leg for two days. (10/9/09 Tr. at 165.) An x-ray revealed that T.H.'s femur was broken. (10/9/09 Tr. at 162.) A.G. stated that T.H.'s leg had become wrapped up in a blanket, and when A.G. opened the blanket, T.H.'s leg flopped out. (10/9/09 Tr. at 165.) A physician suspected that the fracture had been caused by child abuse, so hospital staff contacted the Department of Public Health and Human Services (the Department). (10/9/09 Tr. at 27, 171.)

A child protection specialist with the Department, Whitney Cole (Cole), went to the emergency room and spoke with A.G. (10/9/09 Tr. at 26-27.) A.G. informed her that she first noticed that T.H.'s leg was not moving on the night of Saturday, November 29, 2008. (10/9/09 Tr. at 30.) According to A.G., T.H. was lying in a reclining chair that bounced,[2] and A.G. noticed that she was not moving her right leg. (Id.) A.G. claimed that she attempted to call the hospital, but the hospital would not give her any information, so she decided to bring T.H. in to be checked on Monday morning. (Id.)

[2] Detective Tony Steffins explained that this device, which A.G. refers to as a bouncy chair, is a reclining chair that vibrates. (10/9/09 Tr. at 95.)

Further investigation revealed that T.H. had two broken ribs and a broken clavicle. Because T.H. had four fractures for which the parents did not have any plausible explanation, Cole placed a 48-hour hold on T.H. and planned to file for custody. (10/9/09 Tr. at 34; D.C. Doc. 2, Cole Aff. at 5.) T.H. was released from the hospital on December 4, 2008, into the custody of the Department. (10/9/09 Tr. at 174.)

On December 5, 2008, the Department filed a Petition for Immediate Protection and Emergency Services, for Adjudication as Youth in Need of Care and for Temporary Legal Custody. (D.C. Doc. 2.) The district court granted immediate protection and emergency protective services and scheduled a show cause hearing on the petition for adjudication of T.H. as a youth in need of care and for temporary legal custody. (D.C. Doc. 4.) The district court also appointed a guardian ad litem, Gail McCormick (McCormick), and an attorney for the guardian ad litem. (D.C. Doc. 5.)

Prior to the show cause hearing, McCormick filed a detailed report, in which she described the parents' supervised visits with T.H. McCormick observed that the parents were awkward with T.H., did not know how to communicate with her, and exhibited immature parenting skills. (D.C. Doc. 18 at 4-5.) McCormick observed that R.H. did not appear to be bonded to T.H., and described him at one visit as "bored, restless, and bounc[ing] his knee nervously." (Id. at 4, 9.)

McCormick also described A.G.'s behavior toward Jacqui Poe (Poe), the social worker who replaced Cole, as "defensive, rude, argumentative, volatile, and disrespectful." (Id. at 5.) McCormick concluded that there is

> great cause for concern for the safety of this child in the immediate family environment. No one in the family is taking any responsibility for the injuries inflicted upon this baby, and obviously no one protected this baby from this neglect and abuse. I am especially concerned about the time lapse in getting medical help when the baby could not use her right leg . . . . If we don't take appropriate actions now for the protection of this child, she could suffer permanent disability or death.

(Id. at 10 (emphasis added).)

A show cause hearing was held on January 6, 2009. At the beginning of the hearing, Dr. Peggy O'Hara (Dr. O'Hara) took the stand to testify for the State. Before her testimony began, however, R.H.'s counsel indicated that R.H. wished to stipulate that T.H. was a youth in need of care.

> [R.H.'s counsel]: Your Honor, could we, before we proceed, advise the Court that my client intends to stipulate as to his child being a youth in need of care, and would not require the State to produce any documentation or evidence.
>
> THE COURT: Okay, Jami?
>
> [A.G.'s counsel]: And I think based on the circumstances, your Honor, my client will also do the same. We'll stipulate, Judge.
>
> THE COURT: Okay. You'll stipulate that, at this point, based on the reports--and I read the reports when they first came in, I did not review them, today, but I did read [McCormick's] report that the youth is a youth in need of care. So, the Court will so adjudicate and grant temporary legal custody to the State.

You have to work out a treatment plan.

[The Department]: We'll have to have a dispositional hearing within twenty days, so that will give the Department and the CASA some time to put some proposals together and provide them to the parents.

THE COURT: Okay. Alright, so that's what we'll do.

(1/6/09 Tr. at 2.)

The dispositional hearing was originally scheduled for January 26, 2009, but R.H. filed an unopposed motion to continue the dispositional hearing. (D.C. Doc. 23.) The dispositional hearing was then rescheduled for March 10, 2009. (D.C. Doc. 24.) That hearing was never held because, on March 6, 2009, the Department filed a Petition for Termination of Parental Rights of Respondent Parents, for Permanency Plan, and Affidavit in Support. In that petition, the Department moved for termination under Mont. Code Ann. § 41-3-609(1)(d), based on the parents subjecting T.H. to the conditions in Mont. Code Ann. § 41-3-423(2)(a),(c), and (d), and under Mont. Code Ann. § 41-3-609(1)(f), based on a treatment plan not being required under Mont. Code Ann. § 41-3-609(4)(a). (D.C. Doc. 26.) In the petition, the Department noted that the parents had stipulated to adjudication of T.H. as a youth in need of care, and alleged that since that time the Department had obtained medical findings that could establish by clear and convincing evidence that T.H. has been abused and neglected. (D.C. Doc. 26 at 2.) The Department also alleged that "reasonable efforts are not

possible due to the serious danger of continued abuse and neglect, and in part based on the prior abuse and neglect. No further efforts for reunification with respect to the parents and the youth are necessary or in the best interests of the youth." (Id. at 4.)

The petition contained an affidavit from the social worker, Poe, in which Poe explained that medical professionals had concluded that T.H.'s injuries were consistent with child abuse. (D.C. Doc. 26, Poe Aff. at 2-7.) In addition, Poe noted that the parents' supervised visitations had not gone well because A.G. used the visits to argue with Poe, and neither parent exhibited remorse or sadness that their child has suffered significant injuries. (Id. at 4-5.) The Department concluded that preservation and reunification services did not need to be provided to R.H. and A.G. because they had subjected their child to chronic abuse and severe neglect, and T.H.'s injuries were caused by an aggravated assault. (Id. at 8.) In addition, Poe concluded that the parents had neglected T.H. to an extent that resulted in serious bodily injury. Poe stated:

> Because the parents severely neglected and chronically abused [T.H.] and because they refused to admit that they caused her injuries or that they were responsible for neglecting her, no treatment plan would be successful. There are no issues, problems to address, or goals for the parents to reach. I also believe their conduct is unlikely to change because they hurt and neglected their child for the first four months of her life then refused to admit she was abused and did not admit any responsibility for the abuse and neglect [T.H.] incurred. They have continued to disregard their child's injuries an additional three and a half months after she was removed.

> It is the department's position that there are no service providers that can guarantee these parents will not harm [T.H.] in the future.
>
> If the parents do not believe anything wrong happened there is no way to make them safe to parent this child.

(Id.)

In response, the district court filed an Order Vacating Disposition Hearing, Setting Hearing on State's Petition for Termination of Parental Rights of Respondent Parents, for Permanency Plan, and Continuing Temporary Legal Custody in the Interim. (D.C. Doc. 27.) The Court ordered that

> reasonable efforts to reunify are not possible due to the serious danger of continued abuse and neglect, and in part based on the adjudication of the prior abuse and neglect. No further efforts for reunification with respect to the parents and the youth are necessary or in the best interests of the youth pending a hearing on the petition in this matter.

(Id. at 1.)

After two continuances, the hearing on the petition to terminate was scheduled for October 9, 2009. Shortly before the hearing, the guardian ad litem, McCormick, filed an addendum to her previous report. (D.C. Doc. 76.) McCormick explained that T.H. was 16 months old at the time of the report. T.H. had progressed rapidly while she was in the care of a foster family, and had not experienced any more fractures. (Id. at 2.) McCormick explained that A.G. and

R.H. had provided multiple stories about what might have caused T.H.'s injuries, but their stories were not plausible and contained inconsistencies. (Id. at 9.)

The termination hearing was held on October 9, 2009 and November 5, 2009. Whitney Cole testified that she had been employed by the Department as a child protection worker on December 1, 2008, and she had investigated T.H.'s case. (10/9/09 Tr. at 26.) Cole explained that during her first observation of the parents, T.H. was crying, and A.G. failed to use soothing methods to comfort her. (10/9/09 Tr. at 29.) During this time, R.H. remained on the other side of the room and did not interact with T.H. (Id.) R.H. stated that A.G. usually deals with T.H. (Id.) Cole described R.H.'s affect as "absent, almost checked out a little bit." (Id.) A.G.'s explanation for the femur fracture was that a blanket had been wrapped around T.H.'s leg, and A.G. had pulled on it. (10/9/09 Tr. at 30.) The treating physician, however, did not believe that was a plausible explanation for the injury. (10/9/09 Tr. at 60.)

On December 3, 2008, Cole went to the hospital with Poe because Poe was going to take over the case. Since Cole's first visit with the family, Cole had learned that T.H. had had two broken ribs and a broken clavicle, in addition to the broken femur. Cole asked A.G. if she could explain those injuries, and A.G. said that bones break when babies are born. (10/9/09 Tr. at 37.) Cole questioned A.G. about whether T.H. had been cared for by anybody else who could have caused

these injuries. A.G. stated that she is a stay-at-home mother, and she had never left T.H. with anybody else for a significant period of time. (10/9/09 Tr. at 38.)

Poe testified that she was the child protection specialist assigned to the case after December 9, 2008. (10/9/09 Tr. at 55.) Poe explained that while T.H. was in the hospital, Poe and Cole both consulted with Dr. O'Hara, the treating physician, to determine if there were any explanations for T.H.'s injuries other than child abuse. (10/9/09 Tr. at 54, 56.) Dr. O'Hara and Poe arranged for tests to rule out medical explanations for T.H.'s injuries and to determine if T.H. had any other injuries. (10/9/09 Tr. at 57.)

Poe testified that A.G. and R.H. eventually suggested that R.H. might have accidently squeezed T.H. too tightly, or she might have got her leg caught in the crib. (10/9/09 Tr. at 60.) The medical professionals Poe consulted with, however, did not believe the injuries could have been caused by accidental means. (Id.)

Poe explained that she had attended the parents' supervised visits of T.H. At those visits, A.G. was extremely belligerent and volatile. (10/9/09 Tr. at 62.) On one occasion, R.H. had also been belligerent with Poe. (11/5/09 Tr. at 309.) During those visits, neither parent expressed concern about T.H.'s injuries or asked how she was progressing. (10/9/09 Tr. at 62-63.)

Poe concluded that: T.H.'s health, welfare, and safety were adversely affected due to numerous incidents of physical abuse and severe medical neglect;

T.H. would be in danger of being abused or neglected if she was returned to her parents; A.G. and R.H. did not meet T.H.'s physical, psychological, or medical needs; A.G. and R.H. were grossly negligent; A.G. and R.H. committed psychological abuse and neglect; and aggravated circumstances listed in Mont. Code Ann. § 41-3-423(2)(a), including torture, chronic abuse, severe neglect, and aggravated assault, had been established. (11/5/09 Tr. at 299-302.) Poe also stated that the conditions that made A.G. and R.H. unfit parents were unlikely to change within a reasonable time because neither parent had accepted any responsibility for T.H.'s injuries. (11/5/09 Tr. at 304.) Poe further testified that termination of A.G.'s and R.H.'s parental rights was in T.H.'s best interests because the risk of her dying if she was returned to their care was too great. (11/5/09 Tr. at 303.)

Detective Tony Steffins (Detective Steffins) testified that he interviewed both of the parents separately, and neither parent was able to provide him with a plausible explanation for T.H.'s injuries. (10/9/09 Tr. at 92, 94.) A.G. stated that R.H. had admitted that he might have squeezed T.H. too hard one time. A.G. could not, however, provide any more details about this alleged incident. (10/9/09 Tr. at 85.) R.H. offered the same explanation for T.H.'s broken ribs, but was unable to explain the other injuries. (10/9/09 Tr. at 94.) There were minor inconsistencies in R.H.'s and A.G.'s stories, and A.G. claimed that they took T.H.

to see A.G.'s mother on Sunday, November, 30, 2008, which A.G.'s mother denied. (10/9/09 Tr. at 11, 89, 90, 95-96.)

Dr. Mark Schulein (Dr. Schulein) testified that he had performed three wellness checks on T.H. while she was in her parents' care. (10/9/09 Tr. at 114.) Dr. Schulein never noticed any broken bones or other signs of abuse on T.H. (10/9/09 Tr. at 120.) He explained, however, that if a fracture had been healing for a couple of weeks and the parents did not disclose that the child appeared to be in pain, he may not have noticed the fracture during a wellness check. (10/9/09 Tr. at 128.) Dr. Schulein was concerned at the last wellness check, conducted in November, that T.H. was not gaining enough weight. (10/9/09 Tr. at 124.) When T.H. was born, she was in the twenty-fifth percentile, but she had dropped to the fifth percentile by November. (10/9/09 Tr. at 125.)

Dr. Jeffrey Scott Prince (Dr. Prince), a pediatric radiologist, testified that he had reviewed T.H.'s x-rays which had been taken on December 1-2, 2008. Dr. Prince concluded that T.H. had undergone at least two different episodes of injury. (10/9/09 Tr. at 135.) He explained that the injury to T.H.'s two ribs was at least three weeks old, the clavicle injury was two to four weeks old, and the femur injury was between ten and fourteen days old. (10/9/09 Tr. at 136.) He specifically stated that the femur fracture could not have been only three days old, as the parents had claimed. (Id.) Dr. Prince explained that rib fractures are

extremely uncommon in young children, and the most common cause for the injury is child abuse where the abuser squeezes or shakes the child with a significant amount of force. (10/9/09 Tr. at 137, 146.) Similarly, he explained that clavicle fractures are extremely uncommon in children who are not old enough to walk because it takes a significant impact to cause the fracture. (10/9/09 Tr. at 138.) In addition, Dr. Prince testified that the femur is a very strong bone that could only be fractured with a high degree of force. (10/9/09 Tr. at 142.) T.H.'s femur appeared to have been fractured by applying force in a twisting motion. (10/9/09 Tr. at 149.) Dr. Prince concluded that T.H.'s injuries were not consistent with accidental injuries, and were consistent with abuse. (10/9/09 Tr. at 144.)

According to Dr. Prince, T.H.'s fractures would have been very painful, and it should have been obvious to her caregivers that she was exhibiting the symptoms of pain. (10/9/09 Tr. at 140-42.) Dr. Prince explained that these injuries might not have caused any external injury, and a physician performing a wellness check on the child might not discover the injury if the injury had had time to heal, but a caregiver who is with the child every day should notice a change in the child's behavior. (10/9/09 Tr. at 153-54.)

Dr. O'Hara testified that she examined T.H. when she came into the emergency room in December 2008 and provided follow-up care. (10/9/09 Tr. at 162, 175.) During the initial examination, Dr. O'Hara observed that T.H. appeared

to be in distress. (10/9/09 Tr. at 166.) Dr. O'Hara described A.G. as upset, angry, rude, belligerent, and not empathetic towards T.H. (10/9/09 Tr. at 168.)

After Dr. O'Hara learned that T.H. had multiple fractures, she ordered more tests. (10/9/09 Tr. at 169, 173.) A CT scan and MRI were done and did not detect any bleeding in T.H.'s brain. (10/9/09 Tr. at 169, 172.) An eye exam was performed on December 26, 2008, to determine if T.H. had retinal hemorrhaging, which is caused by being shaken. (10/9/09 Tr. at 176.) The exam did not show any evidence of retinal hemorrhaging, but the test can only detect retinal hemorrhaging that has occurred within the past month, and T.H. had been in the custody of the Department during most of the prior month. (10/9/09 Tr. at 177.) Other tests were conducted to determine that T.H. did not have a genetic bone disorder, and the results of those tests were negative. (10/9/09 Tr. at 178-79.)

Dr. O'Hara concluded that none of the potential explanations A.G. and R.H. had provided for T.H.'s injuries were plausible, and that T.H.'s fractures had been caused by abuse. (10/9/09 Tr. at 180-84.) She also concluded that the parents' failure to seek medical attention for the fractures constituted medical neglect, whether the delay had been two days, as the parents claimed, or at least 10 days, as Dr. Prince had determined. (10/9/09 Tr. at 183-84.) Dr. O'Hara also concluded, based on T.H.'s inadequate weight gain, that T.H. suffered from mild failure to thrive. (11/5/09 Tr. at 282.) In addition, Dr. O'Hara diagnosed T.H. with gross

motor delay, and referred T.H. to a physical therapist to treat the delay. (10/9/09 Tr. at 200.) Further, Dr. O'Hara testified that she could say, with a reasonable degree of medical certainty, that T.H. had been shaken. Dr. O'Hara explained that posterior rib fractures are caused by squeezing or shaking a baby, and in abuse situations, the abuser typically shakes the child multiple times, rather than just squeezing. (11/5/09 Tr. at 294, 296.)

A specialist in child abuse, Dr. Karen Mielke, testified that there were numerous indications that T.H. had been abused and neglected. Dr. Mielke testified that failure to thrive is an indicator of a neglected child. (10/9/09 Tr. at 218.) Similarly, she explained that fractures that cannot be explained and multiple fractures caused at different times are indicators that fractures are nonaccidental. (10/9/09 Tr. at 219.) Further, the age and development of the child can be an indicator of whether the fracture is accidental. (10/9/09 Tr. at 220.) Dr. Mielke explained that posterior rib fractures, like those T.H. sustained, are very uncommon and are almost always caused by shaking. (10/9/09 Tr. at 223.) In addition, she testified that shaking a baby can cause serious bodily injury or death. (10/9/09 Tr. at 222, 251.) The fracture of the clavicle, she explained, would have been caused by a direct blow to the shoulder. (10/9/09 Tr. at 223.)

Dr. Mielke concluded that: T.H. had suffered from failure to thrive and medical neglect while she was in her parents' care; her injuries were caused by

chronic child abuse; T.H. was likely shaken by one of her parents; and T.H. did not receive the level of care needed by her parents. (10/9/09 Tr. at 225, 227, 229, 235, 247.) Further, Dr. Mielke concluded that T.H. faced "significant risk of serious bodily injury, or death" if she was returned to her parents. (10/9/09 Tr. at 236.)

R.H. and A.G. both testified at the termination hearing. R.H. testified that, at the time of the hearing, he was 22 years old and had obtained his GED. (11/5/09 Tr. at 311.) R.H. testified that while T.H. was in his custody, he worked approximately 40 hours a week as a carpet installer. (11/5/09 Tr. at 311, 317.) He explained that when he was home, he participated in caring for T.H., including changing her diapers and feeding and bathing her. (11/5/09 Tr. at 317.)

R.H. explained that he first noticed a difference in T.H.'s behavior at 11:30 on the night of Saturday, November 29, 2008. (11/5/09 Tr. at 326.) R.H. and A.G. were watching movies, and they noticed that T.H., who had not gone to bed yet, did not seem to be kicking her right leg like she usually does. (11/5/09 Tr. at 327.) R.H. stated that nothing appeared to be physically wrong with her leg, and it was not swollen, but he suggested that A.G. call the emergency room. She called the hospital, but the hospital did not give her any information. (11/5/09 Tr. at 327.) According to R.H., T.H. did appear to be kicking her leg slightly on Sunday, so they decided to wait and take her to the hospital on Monday. (11/5/09 Tr. at 328.)

R.H. testified that he and A.G. took a few parenting classes after T.H. was removed from their care, and they wanted to get counseling but could not afford it. (11/5/09 Tr. at 335.) R.H. acknowledged, however, that although parenting classes are offered for free or on a sliding scale, R.H. and A.G. waited nearly a year before taking the classes. (11/5/09 Tr. at 347.) R.H. testified that he had problems with alcohol earlier in his life, but stated that he no longer has a problem with alcohol use. (11/5/09 Tr. at 312.) R.H. testified that he had gone to drug or alcohol rehab in January 2008, but he left before completing the program. (11/5/09 Tr. at 353-54.) He testified that A.G. had smoked marijuana about once a month while she was pregnant, and he smoked marijuana a couple of times per month. (11/5/09 Tr. at 343, 352.)

A.G. also testified that she was 22 years old at the time of the hearing, and she had dropped out of school in the tenth grade. (11/5/09 Tr. at 357-58.) A.G. stated that she and R.H. first noticed a problem with T.H.'s leg at about eleven o'clock on Saturday, November 29, 2008. (11/5/09 Tr. at 364.) They were watching cartoons with T.H. T.H. was in a reclining chair that vibrates, and they noticed that she was not moving her leg. (11/5/09 Tr. at 364.) In later testimony, A.G. stated that they were watching a movie in a room lit only by the television, and T.H. was covered by a blanket, but they noticed that she was not moving her leg. (11/5/09 Tr. at 378.) She called the hospital, but the hospital would not give

her any information. (11/5/09 Tr. at 365.) She then called her mother, and her mother told her to call the hospital again. (11/5/09 Tr. at 365.) A.G. decided that rather than taking T.H. to the hospital immediately, she would wait and see if T.H.'s leg improved. According to A.G., T.H.'s leg was slightly swollen, but otherwise it looked fine. (11/5/09 Tr. at 365.) A.G. claimed that T.H. was moving her leg slightly on Sunday, and A.G. decided that she would take T.H. into the hospital Monday morning. (11/5/09 Tr. at 366.) A.G. called R.H. from the hospital that Monday to let him know that T.H. had a fractured femur and the Department had become involved. In response, R.H. left work and went to the hospital. (11/5/09 Tr. at 329.)

A.G. testified that, after the fractured femur was discovered, she told the social worker that it might have happened when a blanket was wrapped around T.H.'s leg, but she admitted that she did not really think that is what might have happened. (11/5/09 Tr. at 368.) A.G. claimed that she had no knowledge of T.H.'s other fractures until the hospital discovered them on an x-ray. (11/5/09 Tr. at 369.)

When A.G. was asked about the statement she made at the hospital that she had noticed, when she opened the blanket, that T.H.'s leg flopped out, she stated that that had occurred on the prior Thursday. (11/5/09 Tr. at 379.) At that time, however, she did not believe anything was wrong with T.H.'s leg. (11/5/09 Tr. at 388.)

Finally, the guardian ad litem testified that she believed that A.G.'s and R.H.'s parental rights should be terminated. (11/5/09 Tr. at 393.)

On February 2, 2010, the district court issued Findings of Fact, Conclusions of Law, and an Order Terminating Parental Rights. (Appellant's App. A.) The district court issued detailed findings of fact in which it found that: the fractures would have been painful and observable to a care provider; the parents' delay in seeking medical attention for each of T.H.'s injuries constituted chronic, severe neglect and chronic abuse; the parents delayed seeking medical attention because they hoped evidence of the injuries would subside; T.H.'s fractures were caused by physical abuse; and the parents never provided a reasonable explanation for T.H.'s injuries or showed any remorse. (Appellant's App. A at 5-11.) Based on these findings, the court concluded that the parents had subjected T.H. to aggravated circumstances which constitute chronic abuse and chronic, severe neglect. Those circumstances constitute grounds to terminate parental rights under Mont. Code Ann. § 41-3-423(2)(a) and Mont. Code Ann. § 41-3-609(1)(d).

SUMMARY OF THE ARGUMENT

The district court correctly terminated R.H.'s parental rights after the court determined that R.H. had subjected T.H. to chronic abuse and chronic, severe neglect. On appeal, R.H. argues that the termination of his parental rights violated

his right to due process because a written adjudication order was never entered, a dispositional hearing was never held, and a hearing was never held before the district court determined that reasonable efforts did not need to be made. R.H. waived all of these arguments by failing to object below. Because R.H. was represented by counsel and did not raise these objections, these arguments should not be reviewed on their merits.

Furthermore, none of the due process arguments raised by R.H. constitutes a ground for reversal. The only error the district court made was in failing to issue written findings following the adjudicatory hearing. Because R.H. stipulated that T.H. was a youth in need of care and the district court issued an oral ruling, the district court's failure to issue written findings was harmless. The district court correctly vacated the dispositional hearing because the petition for termination was filed before the dispositional hearing could be held. At that point, the dispositional hearing was no longer required.

In addition, the district court did not err in ruling that reunification efforts were not required before holding a hearing on that issue. Neither the statute, nor due process, require a separate hearing on the issue of whether reunification efforts need to be made. In this case, the district court had overwhelming evidence from which it could determine that the parents had subjected T.H. to chronic abuse and chronic, severe neglect. Those findings enabled the district court to conclude that

reunification efforts did not need to be made. The termination hearing provided R.H. with a hearing on whether he had subjected T.H. to chronic abuse and chronic, severe neglect. Following that hearing, the district court again found that R.H. had subjected T.H. to chronic abuse and chronic, severe neglect. This procedure was fundamentally fair and did not violate R.H.'s right to due process.

R.H. also argues that the district court abused its discretion when it terminated his parental rights because the evidence was insufficient to support the termination. The testimony of the medical professionals and social workers established, however, that T.H. was abused by her parents, that she suffered four fractures as a result of that abuse, and that neither parent sought timely medical treatment for those fractures. Even if R.H. did not cause T.H.'s fractures, the testimony demonstrated that he committed chronic abuse and chronic, severe neglect of T.H. by failing to seek medical treatment. Accordingly, the district court did not abuse its discretion when it terminated R.H.'s parental rights.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews a district court's order terminating parental rights for an abuse of discretion. In re J.C., 2008 MT 127, ¶ 33, 343 Mont. 30, 183 P.3d 22. "An abuse of discretion occurs when a district court acts arbitrarily without

conscientious judgment or exceeds the bounds of reason." State v. McCaslin, 2004 MT 212, ¶ 15, 322 Mont. 350, 96 P.3d 722.

This Court reviews the factual findings of the district court to determine if they are clearly erroneous and reviews conclusions of law to determine if they are correct. In re J.C., ¶ 34. A factual finding is clearly erroneous if "it is not supported by substantial evidence, if the trial court misapprehended the effect of the evidence, or if our review of the record convinces us that a mistake has been committed." Id. (internal citations and quotation marks omitted).

II. THE TERMINATION PROCEEDINGS WERE FUNDAMENTALLY FAIR AND DID NOT VIOLATE R.H.'S RIGHT TO DUE PROCESS.

A. Applicable Law

In previous cases involving the termination of parental rights, this Court has stated that, although the phrase "due process" cannot be precisely defined, it "expresses the requirements of fundamental fairness." In re A.R., 2004 MT 22, ¶ 11, 319 Mont. 340, 83 P.3d 1287 (citations and quotation marks omitted). Furthermore, this Court has repeatedly held that "the termination of parental rights invokes fundamental liberty interests which must be protected by fundamentally fair procedures." In re J.C., ¶ 35 (citations and quotation marks omitted). Due process and fundamental fairness require that parents be represented by counsel at proceedings to terminate, and that parents not be placed at an unfair advantage

during the termination hearings. Id. The court's primary consideration, however, is the best interests of the child as demonstrated by the child's physical, mental, and emotional needs. Id.; In re T.C., 2008 MT 335, ¶ 16, 346 Mont. 200, 194 P.3d 653.

The district court terminated R.H.'s parental rights under Mont. Code Ann. § 41-3-609(1)(d) and (f). Montana Code Annotated § 41-3-609(1)(d) provides that, "The court may order a termination of the parent-child relationship upon a finding established by clear and convincing evidence" that "the parent has subjected a child to any of the circumstances listed in § 41-3-423(2)(a) through (2)(e)." The circumstances listed in Mont. Code Ann. § 41-3-423(2)(a) include "torture, chronic abuse . . . or chronic, severe neglect." The district court found that R.H. had subjected T.H. to chronic abuse and chronic, severe neglect, which are circumstances listed in Mont. Code Ann. § 41-3-423(2)(a). (Appellant's App. A at 12.)

In the alternative, the district court terminated under Mont. Code Ann. § 41-3-609(1)(f), which provides that a court may order termination if:

> the child is an adjudicated youth in need of care and both of the following exist:
>
> (i) an appropriate treatment plan that has been approved by the court has not been complied with by the parents or has not been successful; and

(ii) the conduct or condition of the parents rendering them unfit is unlikely to change within a reasonable time.

A treatment plan is not required under this part if the court finds that the parent has subjected a child to any of the circumstances listed in Mont. Code Ann. § 41-3-423(2)(a) through (e). Mont. Code Ann. § 41-3-609(4)(a); see also In re A.N.W., 2006 MT 42, ¶ 51, ¶ 55, 331 Mont. 208, 130 P.3d 619 (upholding termination of parental rights under subsection (f) where treatment plan was not required under subsection (4)). The district court concluded that a treatment plan was not required in this case because R.H. had subjected T.H. to the circumstances in Mont. Code Ann. § 41-3-423(2)(a), and the conduct of R.H. was unlikely to change within a reasonable time. (Appellant's App. A. at 12-13.)

B. The District Court's Failure to Issue an Adjudicatory Order Containing Written Findings Did Not Render the Proceedings Fundamentally Unfair.

1. R.H. Waived the Argument That the District Court Erred by Failing to Issue Written Findings Because He Failed to Object in the District Court.

In the Department's petition to adjudicate T.H. as a youth in need of care, the Department alleged that T.H. had suffered abuse or neglect evidenced by multiple bone fractures for which the parents could not provide a plausible explanation, and T.H. had physical developmental delays consistent with failure to thrive. (D.C. Doc. 2 at 3.) At the adjudicatory hearing, the Department was prepared to offer testimony to support these allegations, but R.H.'s attorney stated

"my client intends to stipulate as to his child being a youth in need of care, and would not require the State to produce any documentation or evidence." (1/6/09 Tr. at 3.) Based on that stipulation, the district court adjudicated T.H. a youth in need of care and granted temporary legal custody to the Department. (Id.) The district court did not enter an adjudicatory order containing written findings following the adjudicatory hearing.

R.H. waived any objection to the lack of the written findings by failing to raise any objection in the district court to the lack of written findings. As a general rule, a party must notify the court at the time the objectionable conduct is at issue to properly preserve an issue for appeal. In re A.T., 2006 MT 35, ¶ 15, 331 Mont. 155, 130 P.3d 1249. A party that fails to raise a timely objection waives the party's right to appeal that issue. Id. This court explained that "it is fundamentally unfair to fault the trial court for failing to rule correctly on an issue it was never given the opportunity to consider." In re D.H., 2001 MT 200, ¶ 41, 306 Mont. 278 33 P.3d 616.

This Court has declined to make exceptions to this general rule for child cases. In re T.E., 2002 MT 195, ¶¶ 20-23, 311 Mont. 148, 54 P.3d 38; In re A.N.W., ¶ 40. The Court observed that the district court cannot correct statutory deficiencies if those deficiencies are not brought to the court's attention. In re T.E., ¶ 23. Further, to allow litigants not to object in the district court would

encourage litigants to withhold objections and raise the issue on appeal. Id. Such a result would undermine the integrity of the district court proceedings and result in prolonged litigation that would "directly conflict with the primary consideration which the law gives to the child's best interest, and the requirement that child cases be expedited, so that cases can be resolved, and children can be provided permanent, caring home environments as soon as possible." Id.

In this case, R.H. waived any objection to the lack of written findings by failing to object. If R.H. had objected to the district court, the court could have corrected its error by entering the findings. Because R.H. did not give the district court the opportunity to correct its error, this claim should not be reviewed on appeal.

2. If This Court Reviews This Claim on the Merits, It Should Determine That the District Court's Failure to Issue Written Findings Was Harmless.

Even if this Court reviews this claim on the merits, it should be rejected. Although the State acknowledges that, pursuant to Mont. Code Ann. § 41-3-437(7)(a),[3] the district court should have made written findings following

[3] Mont. Code Ann. § 41-3-437(7)(a) provides:

> Before making an adjudication, the court may make oral findings, and following the adjudicatory hearing, the court shall make written findings on issues, including but not limited to the following:
>
> (i) which allegations of the petition have been proved or admitted, if any;

the adjudicatory hearing, the district court's failure to do so did not undermine the fundamental fairness of the proceedings and was harmless. This Court has recognized that the harmless error doctrine can apply in the parental termination context. In doing so, this Court noted that it "has consistently interpreted abuse and neglect statutes to protect the best interest of the children. In matters involving abused and neglected children we have consistently held that a district court may protect the children's best interest despite procedural error." In re J.C., ¶ 43 (citations and quotation marks omitted). It is well established that "no civil case shall be reversed by reason of error which would have no significant impact upon the result; if there is no showing of substantial injustice, the error is harmless." Id. (citations and quotation marks omitted). This Court concluded in In re J.C. that the district court's failure to adjudicate the youth as a youth in need of care was harmless because the parents had stipulated numerous times to treatment plans that referred to the youth as a youth in need of care, and there was ample evidence from which the district court could have adjudicated the youth a youth in need of care if the parents had objected below. In re J.C., ¶ 46, ¶ 50.

(ii) whether there is a legal basis for continued court and department intervention; and

(iii) whether the department had made reasonable efforts to avoid protective placement of the child or to make it possible to safely return the child to the child's home.

In this case, the error is purely procedural and did not impact R.H.'s fundamental rights. Both parents stipulated that T.H. was a youth in need of care and explicitly stated that the Department did not need to produce any documentation or evidence. In response, the district court orally stated that, based on the stipulation and the reports that had been submitted, the district court was adjudicating T.H. a youth in need of care. The adjudicatory hearing did not involve any contested facts, and the parents could not contest the district court's adjudication of T.H. as a youth in need of care because they had stipulated to that finding. Therefore, a written order would not have benefited the parents. That conclusion is supported by the fact that neither parent objected to the lack of written findings following the adjudicatory hearing until this case was on appeal.

Furthermore, because R.H.'s parental rights were terminated under Mont. Code Ann. § 41-3-609(1)(d), an adjudicatory hearing was not a prerequisite to terminating A.G.'s parental rights. In re K.J.B., 2007 MT 216, ¶ 37, 339 Mont. 28, 168 P.3d 629. The Department could have moved to terminate at any time, including in the initial petition, and R.H.'s parental rights could have been terminated under subsection (d) without T.H. ever being adjudicated a youth in need of care. Mont. Code Ann. § 41-3-422(1)(a)(v); Mont. Code Ann. § 41-3-609(1)(d); In re T.S.B., 2008 MT 23, ¶ 24, 341 Mont. 204, 177 P.3d 429. In this case, the Department requested temporary legal custody in its initial

petition, rather than termination, because the Department had not yet concluded that there were no explanations, other than child abuse, for T.H.'s injuries. Because the adjudication of T.H. as a youth in need of care was not ultimately a requirement for the termination of R.H.'s parental rights under subsection (d), as it would be for termination under subsection (f), she was not prejudiced by the lack of a written order following the adjudicatory hearing.

This case should not be reversed based on a procedural error that did not affect R.H.'s fundamental rights because the best interests of T.H. necessitate that the case be resolved so that she can obtain a permanent, caring home environment.

C. The District Court Did Not Err in Vacating the Dispositional Hearing Because the Hearing Was No Longer Necessary After the Petition for Termination Had Been Filed.

R.H. waived the argument that the district court erred by not holding a dispositional hearing because he never objected to the lack of a dispositional hearing in the district court. Furthermore, the lack of a dispositional hearing was not fundamentally unfair because the Department moved to terminate R.H.'s parental rights before the dispositional hearing could be held. The district court initially scheduled a dispositional hearing within 20 days of the adjudicatory hearing, as required by Mont. Code Ann. § 41-3-438(1). The hearing was continued, however, at the request of R.H. (D.C. Doc. 23.) The dispositional hearing was rescheduled for May 10, 2009. The hearing was vacated, however,

because the Department petitioned for termination of R.H.'s parental rights on May 6, 2009.

After the Department filed a petition for termination, a dispositional hearing was not required. The Department may move to terminate parental rights at any stage in the proceeding, including in the initial petition. Mont. Code Ann. § 41-3-422(1)(a)(v). In most cases, a dispositional hearing is held to establish a treatment plan and evaluate the custody of the child. See Mont. Code Ann. § 41-3-438. Where the department has moved for termination before a dispositional hearing can be held, however, a dispositional hearing would not serve any purpose, and the parent is not entitled to one. Therefore, the district court's failure to hold a dispositional hearing in this case did not render the proceedings fundamentally unfair.

D. The District Court Did Not Err in Finding That Reunification Efforts Were Not Necessary Before a Hearing Was Held on That Issue.

1. R.H. Waived the Argument that He Was Entitled to a Hearing Before the District Court Determined That Reunification Efforts Were Unnecessary Because He Never Objected in the District Court.

R.H. argues for the first time on appeal that the district court was required to hold a hearing prior to determining that reunification efforts were unnecessary. R.H. waived this argument, however, by failing to object to the lack of a hearing in the district court. Had R.H. objected in the district court, the court could have

determined whether a hearing was necessary. Because R.H. did not object, it would be unfair to fault the district court for an alleged error that the court did not have the opportunity to correct. In re D.H., ¶ 41. Furthermore, the best interests of the child are not served by allowing a parent to raise an issue for the first time on appeal because it delays resolution of the case. In re T.E., ¶ 23. Because R.H., who was represented by counsel, did not raise this issue in the district court, this Court should not review it.

2. R.H. Was Not Entitled to a Hearing Before the District Court Determined That Reunification Efforts Did Not Need to Be Made.

If this Court does address this claim on the merits, it should be rejected because R.H. was not entitled to a hearing before the district court concluded that reunification efforts did not need to be made. Under Mont. Code Ann. § 41-3-423(1), the Department is required to make "reasonable efforts to prevent the necessity of removal of a child from the child's home and to reunify families that have been separated by the state." The Department may at any time, however, request a determination that reunification services do not need to be provided. Mont. Code Ann. § 41-3-423(2). In response,

> A court may make a finding that the department need not make reasonable efforts to provide preservation or reunification services if the court finds that the parent has:

> (a) subjected a child to aggravated circumstances, including but not limited to abandonment, torture, chronic abuse, or sexual abuse or chronic, severe neglect of a child;
>
> . . . . .
>
> (c) committed aggravated assault against a child,
>
> (d) committed neglect of a child that resulted in serious bodily injury or death.

Mont. Code Ann. § 41-3-423(2).

In the Department's petition for termination, the Department alleged that A.G. and R.H. had subjected T.H. to the circumstances listed in Mont. Code Ann. § 41-3-423(2)(a), (c), and (d), and requested a finding that reunification services did not need to be provided because of the serious danger of continued abuse and neglect. (D.C. Doc. 26 at 2-4.) In compliance with Mont. Code Ann. § 41-3-423(2), the district court found that reasonable efforts to reunify were not possible due to "serious danger of continued abuse and neglect, and in part based on the adjudication of prior abuse." (D.C. Doc. 27 at 1.) The court explained that reunification efforts were not necessary or in the best interest of T.H. "pending a hearing on the petition in this matter." (Id.)

Neither the statute, nor due process, require a hearing to be held before the district court determines that reunification efforts do not need to be made. Montana Code Annotated § 41-3-423(2), which authorizes the district court to make a finding that reunification efforts are unnecessary, does not require a

hearing on that matter. Moreover, the statutes do not need to require a hearing on whether reunification efforts are necessary before the district court makes that finding. The requirement that the Department make reunification efforts is not a fundamental right. Instead, it is a statutory requirement, and the statute allows it to be dispensed with if the district court finds that the Department has established any of the criteria in Mont. Code Ann. § 41-3-423(2).

Allowing the district court to make a finding that reunification efforts do not need to be made, without holding a hearing prior to that determination, does not violate fundamental fairness because parental rights will not be terminated unless the Department demonstrates at the termination hearing, by clear and convincing evidence, that one of the criteria of Mont. Code Ann. § 41-3-423(2) has been established. At the termination hearing, the parents will have the opportunity to present evidence and cross-examine all of the Department's witnesses. Because a full hearing will be held, the process is fundamentally fair.

In this case, the district court had overwhelming evidence before the termination hearing was held to establish that A.G. and R.H. subjected T.H. to aggravated circumstances, including torture, chronic abuse, and chronic, severe neglect. At the adjudicatory hearing, both parents stipulated that T.H. was a youth in need of care. R.H. did not challenge any of the allegations made in the Department's initial petition, including the allegation that, "Due to the level of

physical abuse and danger to the youth, there were no reasonable efforts that could be made to prevent removal of the youth from the home." (D.C. Doc. 2 at 2.)

In addition, the record contained an affidavit from Cole attached to the initial petition, an affidavit from Poe attached to the petition for termination, and a report from the guardian ad litem. (D.C. Doc. 2; D.C. Doc. 18; and D.C. Doc. 26.) These reports established that T.H. suffered four fractures in the first four and a half months of her life, and neither parent could provide a reasonable explanation for those injuries. Medical professionals had concluded that the fractures were caused by child abuse. (D.C. Doc. 26 at 6-7.) Furthermore, neither parent sought timely medical care for T.H.'s fractures. (D.C. Doc. 26 at 7-8.) Given the seriousness of T.H.'s injuries and the parents' failure to seek timely medical attention, the district court could find that reasonable efforts at reunification were unnecessary without holding a hearing on the matter.

Furthermore, the district court's finding that reunification efforts did not need to be made only allowed the Department to not make reunification efforts until the termination hearing. In order to terminate R.H.'s parental rights, the Department was required to prove at the termination hearing that R.H. had subjected T.H. to the aggravated circumstances in Mont. Code Ann. § 41-3-423(2)(a). R.H. had the opportunity to cross examine all of the Department's witnesses at the termination hearing and to present evidence that could rebut the

Department's allegations. Despite having this opportunity, he failed to provide any evidence to rebut the allegations of child abuse and neglect. Following the termination hearing, the district court concluded that R.H. had subjected T.H. to "aggravated circumstances which constitute chronic abuse and chronic, severe neglect." (Appellant's App. A at 12.) The termination proceeding provided R.H. with a fundamentally fair process and did not violate his right to due process.

Even if this Court determines that a hearing should be held before a district court determines that reunification efforts are unnecessary, the failure of the district court to do so should be considered harmless in this case. R.H.'s failure to rebut the allegations of abuse and neglect at the termination hearing demonstrate that R.H. would have been unable to rebut the allegations if a separate hearing had been held.

III. THE TERMINATION OF R.H.'S PARENTAL RIGHTS WAS SUPPORTED BY CLEAR AND CONVINCING EVIDENCE.

The district court's finding that R.H. subjected T.H. to chronic abuse and chronic severe neglect is supported by clear and convincing evidence. Based on that finding, the district court correctly terminated R.H.'s parental rights under Mont. Code Ann. § 41-3-609(1)(d) and (f).

The district court correctly terminated R.H.'s parental rights under subsection (d) because the evidence established that R.H. had subjected T.H. to

circumstances listed in Mont. Code Ann. § 41-3-423(2)(a). The district court found

> that the repeated injuries and bone fractures of T.H. during her first four and one-half months of life, the severe pain that T.H. endured from these injuries, and failure of Mother and Father to timely seek medical attention for the injuries, and subjecting T.H. to a failure to thrive environment are aggravated circumstances which constitute chronic abuse and chronic, severe neglect of T.H. on the part of Mother and Father.

(Appellant's App. A at 12.)

These findings are supported by overwhelming evidence. When A.G. brought T.H. into the hospital at four and a half months old, T.H. had suffered two fractured ribs, a fractured clavicle, and a fractured femur. Although A.G. claimed that she had first noticed that T.H. was not moving her femur two days before A.G. brought T.H. into the hospital, x-rays revealed that the femur had been broken for at least ten days. (10/9/09 Tr. at 136.) Furthermore, x-rays demonstrated that the other fractures were approximately three weeks old. (Id.) After R.H. and A.G. were informed of T.H.'s injuries, they did not express concern or empathy for T.H. (10/9/09 Tr. at 63.)

Experts on child abuse testified that non-ambulatory children do not fracture their ribs, clavicle, or femur by accidental means, unless a significant event, such as a car accident, has occurred. (10/9/09 Tr. at 137-40, 144, 146-47, 169, 181-82, 219, 223-24.) Neither A.G. nor R.H. provided any plausible explanation for how

T.H. might have obtained the fractures. (10/9/09 Tr. at 180-82, 233.) In addition, the Department conducted medical tests that ruled out medical explanations for T.H.'s fractures. Therefore, the medical professionals concluded that T.H. suffered from chronic abuse and neglect. (10/9/09 Tr. at 184, 229.)

Numerous medical professionals testified that a child with a fractured rib, clavicle, or femur would be in extreme pain, which the child's caregiver would notice. (10/9/09 Tr. at 140-42, 154, 184.) They testified that failure to obtain medical treatment constituted medical neglect. (10/9/09 Tr. at 184, 236.) The medical professionals also explained that the fractured ribs and clavicle might have healed sufficiently by the time Dr. Schulein performed a wellness check, so it was reasonable for him not to have noticed those injuries. (10/9/09 Tr. at 128, 142-43, 153, 234-35, 242.) A caregiver who is with a child every day, however, would notice those injuries. (10/9/09 Tr. at 153-54.)

In addition, T.H. suffered from mild failure to thrive when she was in the care of A.G. and R.H. (10/9/09 Tr. at 227, 247; 11/5/09 Tr. at 282.) T.H.'s weight had fallen into the bottom fifth percentile for her age. (10/9/09 Tr. at 125.)

R.H. argues that there was insufficient evidence to terminate his parental rights because the Department did not establish that he caused T.H.'s fractures. However, A.G. and R.H. had never left T.H. with anybody else for an extended period of time. (10/9/09 Tr. at 38.) Even if T.H.'s injuries were caused by A.G.,

rather than R.H., the evidence establishes that R.H. committed chronic, severe neglect and chronic abuse by failing to seek medical treatment for T.H.'s fractures. Thus, the district court's findings were supported by substantial evidence and are not clearly erroneous. Accordingly, the district court did not abuse its discretion when it terminated R.H.'s parental rights under Mont. Code Ann. § 41-3-609(1)(d).

In addition, the evidence supports the district court's termination of R.H.'s parental rights under Mont. Code Ann. § 41-3-609(1)(f). A.G. argues that termination under subsection (f) was incorrect because no treatment plan was ordered. Under Mont. Code Ann. § 41-3-609(4), however, a treatment plan is not required if a parent subjects a child to the circumstances in Mont. Code Ann. § 41-3-423(2)(a). This Court had upheld the termination of parental rights under subsection (f) in a case where a treatment plan was not required under Mont. Code Ann. § 41-3-609(4). In re A.N.W., ¶ 51, ¶ 55.

Termination under subsection (f) was appropriate because T.H. was adjudicated a youth in need of care, a treatment plan was not required, and the circumstances that rendered A.G. unfit were unlikely to change within a reasonable time. The district court concluded that the circumstances that rendered R.H. unfit were unlikely to change within a reasonable time because of the parents' "unwillingness to admit or accept responsibility for T.H.'s injuries, the severity and nature of the injuries, the age of T.H., and the failure of the parents to

demonstrate any ability or willingness to consider the physical and mental well-being of their child." (Appellant's App. A at 13.)

The testimony of Poe provided clear and convincing evidence to support the district court's conclusion. Poe explained that the parents had been unwilling to work with the Department, and they failed to accept any responsibility for their child's injuries or acknowledge that she had been abused and neglected. (11/5/09 Tr. at 304.) Because the parents did not acknowledge that there was any need for change, Poe concluded that their conduct was not likely to change. (Id.)

The Department established the elements required to terminate parental rights under subsections (d) and (f). Therefore, the district court's order terminating R.H.'s parental rights was not an abuse of discretion.

CONCLUSION

The proceedings terminating R.H.'s parental rights were fundamentally fair and did not violate his right to due process. Furthermore, the district court did not abuse its discretion when it terminated R.H.'s parental rights because the Department established by clear and convincing evidence that R.H. had subjected T.H. to the circumstances listed in Mont. Code Ann. § 41-3-423(2)(a). Accordingly, the district court's order terminating R.H.'s parental rights should be affirmed.

Respectfully submitted this 14th day of May, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing Brief of Appellee to be mailed to:

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 9,272 words, excluding certificate of service and certificate of compliance.

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MARDELL PLOYHAR